DENY?

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 618

JOHN SLATTERY,
Plaintiff-Respondent,

against

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

against

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

JOHN SLATTERY,
Plaintiff-Respondent,

against

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

against

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Marra Bros., Inc., prays that a writ of certiorari issue to review the final decision and judgment of the United States Court of Appeals for the Second Circuit filed January 4, 1951, affirming a final judgment entered in the United States District Court for the Southern District of New York on July 10, 1950, in favor of the plaintiff, John Slattery, against the defendant, Marra Bros., Inc., in the amount of $50,000.00 and in favor of the third-party

defendant, Wm. Spencer & Son Corporation, against the defendant third-party plaintiff, Marra Bros., Inc., dismissing the third-party complaint with costs.

The opinion of the Court of Appeals (R. 456-64) is reported at 186 F. 2d 134. The opinion of the District Court dismissing the third-party complaint (R. 21-4) is reported at 92 F. Supp. 534.

Jurisdiction.

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, Sec. 1).

The judgment of the Court of Appeals affirming the judgment of the United States District Court for the Southern District of New York was entered on January 4, 1951 R. 464-5) and petition for rehearing (R. 465-8) was denied on January 22, 1951 (R. 469).

Summary Statement.

The plaintiff, a longshoreman in the employ of the third-party defendant, was injured on June 13, 1949, when the lower section of a pier door on Pier 2, Hoboken, N. J., while being lifted by fellow employees of the plaintiff, dropped on his foot.

The defendant was the lessee of Pier 2, Hoboken. On the day of the accident, there lay in the slip alongside the pier a lighter which the third-party defendant, a stevedore, had been engaged to lade. To gain access to the slip, it was necessary to raise one of the pier doors. These doors slide up and down vertically and are raised by means of a chain and block. Attached to the upper edge of the door, about midway of the width of the door, is a vertical plate called a "fish-plate" in which there is a hole or eye. When the door is to be opened, the proper way is to insert a

shackle into the eye of the fish-plate and into this shackle a hook, suspended from one end of the chain, is inserted. The other end of the chain, which hangs free from the pulley fastened to the ceiling, extends within reach of men standing on the floor of the pier, who raise the door by pulling on the free end of the chain.

On the day of the accident, there was no shackle fixed in the hole in the fish-plate of the door through which the employees of the third-party defendant intended to move the cargo which they had been engaged to lade. When the employees of the third-party defendant went on the pier to commence their work of loading the lighter, they found the door in question elevated above the floor of the pier about 2 feet and held in position only by the end of the hook inserted into the eye of the fish-plate. They proceeded to further elevate the door, rigged in such fashion. While they were still in the process of elevating the door, the plaintiff, together with the gang boss and another longshoreman, went under the door to the stringpiece and started back while the other members of the gang were still engaged in elevating the door to full height. As the plaintiff was passing under the door the second time, the hook became disengaged from the hole in the fish-plate and the door dropped, pinning the plaintiff's leg under the door and causing the injuries for which the action is brought (R. 457).

The plaintiff brought his action against Marra Bros., Inc., as lessee of the pier on the ground that the plaintiff's injury was caused through the carelessness and negligence of the defendant in the maintenance of the said door and the mechanism for lifting it (R. 6-7). The defendant filed a third-party complaint pursuant to Rule 14 (a) F. R. C. P. (R. 11-13) which, upon motion of third-party defendant, was dismissed with leave to amend (R. 15). An amended third-party complaint was then filed (R. 16-19).

The basis of the amended third-party complaint is that the third-party defendant, as a licensee upon defendant's pier and the employer of the longshoremen who lifted the door which fell upon the plaintiff's foot, was primarily responsible for the plaintiff's injury and liable to indemnify the defendant third-party plaintiff for any judgment which might be obtained against it by the plaintiff. Upon motion of the third-party defendant, the amended third-party complaint was dismissed on the merits without leave to further amend with a written opinion of the District Court (R. 21-4). An appeal from the order entered thereon to the United States Court of Appeals for the Second Circuit was dismissed without opinion for lack of jurisdiction (R. 25-7). A motion for an order revising or vacating the District Court's order of dismissal of the amended third-party complaint pursuant to Rule 54 (b) F. R. C. P. was denied by the District Court (R. 27-9) and the case thereafter went to trial against the original defendant only. After verdict for the plaintiff in the amount of $60,000.00, on defendant's motion for a new trial, the District Court granted the motion unless the plaintiff should file a remittitur reducing the judgment to $50,000.00 (R. 448). The remittitur being filed, a final judgment was entered in favor of the plaintiff against the defendant in the amount of $50,000.00 and in favor of the third-party defendant dismissing the third-party complaint with costs (R. 451), from which appeal was taken by the defendant-third-party plaintiff to the United States Court of Appeals for the Second Circuit (R. 452).

The Court of Appeals, while recognising that the evidence introduced at the trial clearly established the negligence of the employees of the third-party defendant in trying to raise the door rigged as it was (R. 458), yet affirmed the decision of the District Court dismissing the third-party complaint on the merits without trial on the

ground that there could be no right to indemnity from the third-party defendant as the party primarily responsible for the plaintiff's injury, since, as between the plaintiff and the third-party defendant, plaintiff's injury was covered by the New Jersey Workmen's Compensation Act. The Court, however, did not proceed upon the basis of any particular provision of the New Jersey Workmen's Compensation Act, but rather upon its view of common law principles applicable under any compensation statute which gives the employee a right to compensation regardless of the negligence or fault of the employer. In so deciding, the Court of Appeals held that for a right to indemnity to exist, there must either be a contractual relationship between the party held at fault for the plaintiff's injuries and the putative indemnitor, or the putative indemnitor must have been chargeable with a direct tort against the indemnitee (R. 463). In arriving at the conclusion that there was no tort committed by the third-party defendant against the third-party plaintiff in the instant case, the Court held, in reliance upon its earlier decision in *American Mut. Liability Ins. Co.* v. *Matthews*, 182 F. 2d 322, that the third-party defendant owed no duty to the third-party plaintiff to discover the apparent insufficiency of the tackle attached to the door for the safe use thereof; which, the Court conceded, could not be reconciled with the decision of the Ninth Circuit in *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181.

Statutes Involved.

The pertinent portions of the Labor and Workmen's Compensation Laws of the State of New Jersey, the Longshoremen's and Harbor Workers' Compensation Act and of the Workmen's Compensation Law of the State of New York are set forth in an appendix attached hereto, *infra*, pages 22-25.

The Question Presented.

Where the lessee of premises allows an independent contractor to come upon the leased premises to perform a business function thereon and the licensee, through his active, primary negligence, directly and proximately causes an injury to one of his own employees, is the licensee discharged of the common law obligation to indemnify the lessee of the premises who is held liable for the injury so caused by reason of his passive failure of duty to the injured employee as a business invitee, because of the existence of an applicable workmen's compensation statute?

Reasons for Granting the Writ.

1. The decision of the Court of Appeals for the Second Circuit is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *American District Telegraph Co.* v. *Kittleson,* 179 F. 2d 946, and with the decisions of the Court of Appeals for the Ninth Circuit in *United States* v. *Rothschild International Stevedoring Co.,* 183 F. 2d 181 and *United States* v. *Arrow Stevedoring Co.,* 175 F. 2d 329, cert. den. 338 U. S. 904. The decision of the Court of Appeals in the present case is also in conflict with its own previous decisions in *Burris* v. *American Chicle Co.,* 120 F. 2d 218 and *Rich* v. *United States,* 177 F. 2d 688, and with a number of decisions in the District Courts.

2. The decision below is also in conflict with applicable local decisions, most particularly the decision of the New York Court of Appeals in *Westchester Lighting Co.* v. *Westchester Estates Corp.,* 278 N. Y. 175, as will be more fully elaborated in the brief attached to this petition.

3. The question presented is of importance to employers coming within the purview of compensation statutes

and to their compensation insurance carriers. The New York Court of Appeals and the United States Courts of Appeal for the Eighth and Ninth Circuits have held that the fact that the rights and liabilities of an employer and employee are governed by a compensation statute which makes the liability of the employer to pay compensation exclusive of any other liability to his employee, does not affect common law principles of indemnity as between a third party held responsible for the employee's injury and the employer. The United States Court of Appeals for the Second Circuit by its present decision has introduced a limitation upon such common law right to indemnity not hitherto authoritatively enunciated in applicable local decisions or in the United States Courts of Appeal.

Under the decision of the Court below whether the Longshoremen's and Harbor Workers' Compensation Act or the New York Workmen's Compensation Law were the statute involved, the decision would be the same, and the anomalous situation is created that whether indemnity might be had from the employer, where there was no contractual relationship between the employer and the party held at fault, would turn upon the accident of the forum in which the claim was asserted. Thus an employer and his insurance carrier may be held liable to indemnify the third party held responsible for the employee's injury if action is brought in the New York State Courts or in the United States Courts in the Eighth or Ninth Circuits, but be exonerated from such liability if action should be brought in the United States Courts in the Second Circuit.

Although in the present case, there was a compensation statute applicable as between the putative indemnitor and the injured person, which relieved the indemnitor of any direct liability to the injured man, the principle upon which the Court below proceeded in arriving at the conclusion that there could be no right to indemnity, in a still

more recent decision handed down by the Court below on February 9, 1951, in the case of *Spaulding* v. *Parry Navigation Company, Inc. and Todd Shipyards Corporation*, F. 2d , was extended to a non-compensation case. The decision of the Court below in the present case was there cited for the general proposition that indemnity may not be had by one tortfeasor from another where, for any reason, the putative indemnitor would not be directly liable to the injured person. While common liability to the injured person has been recognized as the basis for a common law right of contribution where such exists, it has heretofore been uniformly held that the right to indemnity does not rest upon the basis of a common liability to the injured person, as will be more fully elaborated in the brief hereto attached.

There are a number of cases pending in the District Courts in the Second Circuit which involve the question of indemnity as between tortfeasors, both where compensation statutes are applicable and where no compensation coverage is involved. The decision below in the present case has brought about confusion as to the principles of law applicable in the determination of such cases, which requires clarification by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets No. 89, October Term, 1950, John Slattery, appellee v. Marra Bros., Inc., appellant v. Wm. Spencer & Son Corporation, appellee, and that the decision of the said United States Court of

Appeals for the Second Circuit in said case be reversed and that your petitioner have such other and further relief in the premises as may be just.

MARRA BROS., INC.,
Petitioner,

By EDMUND F. LAMB,
Attorney.

New York, March 5, 1951.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. .....

JOHN SLATTERY,
Plaintiff-Respondent,

against

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

against

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

BRIEF IN SUPPORT OF PETITION

POINT I.

The decision below is in conflict with other decisions in the United States Courts of Appeal.

Although the workmen's compensation statute involved in the instant case is the New Jersey Workmen's Compensation Act, the decision is not based upon any special or particular provision of that statute. The pertinent provisions of that statute are summarized in the opinion of the Court below (R. pp. 461-2) and are set out in full in the Appendix attached hereto (*infra*, pp. 22-3). The Statute provides that the employer shall pay compensation regard-

less of his negligence, that the agreement between the employer and employee to pay and accept compensation "shall be a surrender by the parties thereto of the rights to any other method or form of compensation" and that every contract of hiring shall be presumed to be made with reference to the statute.

In requiring the employer to pay compensation, regardless of his negligence, and in providing that the obligation to pay compensation shall be a surrender by the parties thereto of the rights to any other method or form of compensation, the Statute is substantially identical with the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Secs. 904, 905 (set forth in full in the attached Appendix, *infra*, pp. 23-4).

In *United States* v. *Rothschild International Stevedoring Co.*, 183 F. 2d 181, the Court of Appeals for the Ninth Circuit had before it a case where a longshoreman in the employ of Rothschild had sustained an injury compensable under the Longshoremen's and Harbor Workers' Compensation Act but for which he had obtained a judgment against the United States as the owner of the vessel upon which he was injured. The injury was sustained as the result of a defective condition of one of the vessel's winches which was being operated by co-employees of the injured man. The evidence disclosed that Rothschild, through its employees, by their use of the winch, had warning of its defective condition. Relying upon the Restatement of Torts, Sec. 441 (2), distinguishing between active and passive negligence, the Court held that the negligence of the ship was passive and that, accordingly, the United States was entitled to have full indemnity from Rothschild. A similar decision specifically holding that the Longshoremen's and Harbor Workers' Compensation Act did not bar a claim to indemnity where the employer's negligence primarily caused the injury had been rendered by the same Court in *United States* v.

Arrow Stevedoring Co., 175 Fed. 2d 329; certiorari denied by this Court, 338 U. S. 904.

A similar decision based entirely upon the distinction between primary and secondary fault was also rendered by the Court of Appeals for the Second Circuit in *Rich* v. *United States*, 177 F. 2d 688. In that case an employee of a tank cleaner, employed to clean the tanks of a vessel, was injured by a fall from a Jacobs ladder belonging to the ship. The Longshoremen's and Harbor Workers' Compensation Act was applicable as between the employer and employee. The employee sued the United States as the owner of the vessel, and the United States filed a petition to implead the employer, claiming indemnity on the ground that the employer was primarily at fault. The petition was dismissed in the District Court, but the Court of Appeals reversed, saying (177 F. 2d 691):

> "If it should turn out that the libellant's injuries were primarily caused by the negligence of his employer in fastening the ladder insecurely for his use, the United States would have a cause of action against the employer based upon the latter's independent duty to indemnify it for any loss sustained by the libellant's election to sue it for injuries. It was so held in Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175, 15 N. E. 2d 567, where it was decided that the New York Workmen's Compensation Act containing almost precisely the same language as that now relied upon in the Longshoremen's and Harbor Workers' Act did not bar a suit for indemnity. It was there said that the third party does not sue the employer for damages 'on account of' the injury to or death of the employee but for breach of an independent duty owing to the third party by the employer. 15 N. E. 2d 567, 568. Perhaps it is presently of little significance, but we have already followed this New York decision in a suit under the New

York Act where there was federal jurisdiction because of diversity and where also the tort proved was not joint. Burris v. American Chicle Co., 2 Cir., 120 F. 2d 218, 222. At least it shows that the rule of indemnity is not exclusively one in admiralty or that of a collision situation."

The Court below, in its opinion herein, distinguishes the case of *Rich* v. *United States, supra,* on the ground that in that case there was a contractual relationship between the party held liable for the injury and the putative indemnitor, but as appears from the foregoing quotation from the decision of the Court in that case, the decision was not rested upon such a ground. Moreover, the injury in that case did not arise out of the breach by the employer of any contractual obligation. The obligation of furnishing means of access to and from the ship is primarily the duty of the ship, *Grillo* v. *Royal Norwegian Government,* 139 F. 2d 237. The employer, in securing the ladder to the side of the ship in the *Rich* case, was not performing any obligation incumbent upon him under the contract with the shipowner.

In *American District Telegraph Co.* v. *Kittleson,* 179 F. 2d 946, the United States Court of Appeals for the Eighth Circuit, having before it a claim for indemnity against the employer where the injury came within the coverage of the Iowa Compensation Act, relying upon the similarity between the Iowa Statute and the Longshoremen's and Harbor Workers' Compensation Act and the Workmen's Compensation Law of the State of New York, and upon the decision of the Court of Appeals of the State of New York in *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation,* 278 N. Y. 175, the California Supreme Court in *Baugh* v. *Rogers,* 24 Cal. 2d 200, and the Pennsylvania Supreme Court in *Maio* v. *Fahs,* 339 Pa. 180, and the decision of the Court of Appeals for the

Second Circuit in *Rich* v. *United States, supra,* held that the Iowa Compensation Act was not effective to deprive the third party held liable for the injury of his right to indemnity from the employer, where the employer was primarily at fault. Pointing out that the basis for a common law right to indemnity is that "the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages" (179 F. 2d 951), and that "the law is well settled that where one who is secondarily liable is compelled to respond in damages to the injured party, he may recover the amount paid from the person primarily liable" (179 F. 2d 952), the Court held that the compensation statute could not abrogate the common law right to indemnity from the employer of the third party held liable for the injury.

In *Burris* v. *American Chicle Co.*, 120 F. 2d 218, the United States Court of Appeals for the Second Circuit had before it a claim for indemnity against an employer where the New York Workmen's Compensation Law was applicable to the injury. The Court, in granting indemnity against the employer, despite the New York Workmen's Compensation Law, in reliance upon *Westchester Lighting Co.* v. *Westchester County Small Estates Corporation, supra,* specifically held that the common law right to indemnity rested upon the fact that the employer "was itself the wrongdoer" (120 F. 2d 222), citing a number of cases in the New York Courts. Thus, the Court did not base the right to indemnity upon the existence of a contractual relationship existing between the indemnitee and the indemnitor, although the case is thus distinguished in the opinion below.

In recognizing the common law obligation of a party actively and primarily at fault to indemnify a party passively and secondarily at fault, the Court in the cited case followed the well-established common law doctrine

which has been uniformly followed in all jurisdictions, as will be more completely elaborated in the subsequent point.

There are also numerous decisions in the District Courts sustaining this common law right to indemnity despite the applicability to the injury of either the Longshoremen's and Harbor Workers' Compensation Act or the New York Compensation Law, in none of which is the right of indemnity based upon the restricted grounds stated in the opinion of the Court of Appeals in the instant case.

See:

Rappa v. *Pittston Stevedoring Corporation*, 48 F. Supp. 911;
Severn v. *United States*, 69 F. Supp. 21;
Green v. *War Shipping Administration*, 66 F. Supp. 393;
Corrao v. *Waterman S. S. Corporation*, 75 F. Supp. 482.

POINT II.

The decision of the Court below is in conflict with applicable local law.

Although the injury occurred in the State of New Jersey, suit was brought in the United States District Court for the Southern District of New York. Both New York and New Jersey are common law jurisdictions and it is uniformly established in the common law that where one is cast in liability for his failure to perform a duty through the active negligence of another, he is entitled to recover over from such other, as the active, primary wrongdoer, the amount of damages for which he is cast in liability. This principle is firmly established in the Law of New York.

See:

City of Brooklyn v. *Brooklyn City Railroad Co.*, 47 N. Y. 475, 487;
Oceanic Steam Navigation Co. v. *Compania Transatlantica Espanola*, 134 N. Y. 461;
Phoenix Bridge Co. v. *Creem*, 185 N. Y. 580, aff'g 102 App. Div. 354;
Scott v. *Curtis*, 195 N. Y. 424;
Schwartz v. *Merola Brothers Construction Corporation*, 290 N. Y. 145;
Wischnie v. *Dorsch*, 296 N. Y. 257;
Tipaldi v. *Riverside Memorial Chapel*, 273 App. Div. 414, aff'd 298 N. Y. 686.

Although not as frequently applied, the principle is also recognized in the common law of New Jersey.

See:

Durant v. *Palmer*, 29 N. J. L. 524;
Hoppaugh v. *McGrath*, 53 N. J. L. 81;
Popkin Bros. v. *Volk's Tire Co.*, 20 N. J. Misc. 1, 23 A. 2d 162.

The principle has been also recognized by this Court.

See:

Washington Gas Light Co. v. *District of Columbia*, 161 U. S. 316, 327-8;
George A. Fuller Co. v. *Otis Elevator Co.*, 245 U. S. 489.

It has also been recognized and applied by the Court of Appeals for the Second Circuit in *Burris* v. *American Chicle Co.*, 120 F. 2d 218, 222, and by the Court of Appeals for the Eighth Circuit in *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, and by the Ninth Circuit in *Booth-*

Kelly Lumber Co. v. *Southern Pacific Co.*, 183 F. 2d 902, 907-910. This right to indemnity has never been held to depend upon the existence of contractual relations between the indemnitor and the indemnitee, nor upon the fact that the indemnitor owed the indemnitee any special or particular duty not to be negligent. Thus the New York Court of Appeals in *Oceanic Steam Navigation Co.* v. *Compania Transatlantica Espanola, supra,* which case was cited with approval by this Court in *Washington Gas Light Co.* v. *District of Columbia, supra,* wrote as follows (134 N. Y., at pp. 467-8):

> "Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that everyone is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."

In *Scott* v. *Curtis, supra,* the New York Court of Appeals stated the principle applicable under the facts of the instant case in the following language (195 N. Y., at p. 428):

> "Where the liability rests upon two or more persons who are as against the person injured jointly liable for the injury the rule invoked by the defendants that the court should not interfere as between joint tort feasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor and the others are only liable by reason of their ownership of the property and not by reason of any negligence occurring

by their active interposition or with their affirmative knowledge and assent. When an employee or independent contractor assumes the duty of performing an act which is dependent upon his personal care and attention and an injury arises by reason of lack of such care and attention such person is liable to the owner of the property if he is called upon to pay and does pay the damages arising from such negligence. (Phoenix Bridge Co. v. Creem, supra; Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214.)"

The other cases cited are in accord with these general statements of the principles involved.

The Court below, by its decision in the instant case, has held that these common law principles affecting the right to indemnity as between tortfeasors are abrogated where there is a compensation statute applicable as between the injured person and the putative indemnitor as the employer of such injured person, and that in such an instance for a right to indemnity to exist it must arise from some relationship between the putative indemnitor and indemnitee other than that they are both tortfeasors as to the person injured. As has been pointed out in the preceding point, this limitation upon the common law right to indemnity is in direct conflict with decisions in the Court of Appeals for both the Eighth and the Ninth Circuits. It is also in conflict with the applicable local law.

It has now been definitely settled that a United States Court, in diversity of citizenship cases, is required to follow the conflict of law rule of the Court of the State in which it sits:

Klaxon Company v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487.

It is firmly established in the law of New York that if a contract is made or a tort committed in a state or country

the foundation of whose jurisprudence is known to be the common law, the presumption is indulged that the common law still prevails there and that it is the same as the common law of New York, and unless there is a showing contrary to that presumption the existence and extent of the asserted obligation are determined to be what the common law of New York says they are.

Southworth v. *Morgan*, 205 N. Y. 293, 296;
International Text Book Co. v. *Connelly*, 206 N. Y. 188, 200-1;
Marchant v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 303;
Weissman v. *Banque De Bruxelles*, 254 N. Y. 488, 495;
Cherwien v. *Geiter*, 272 N. Y. 165, 168;
Read v. *Lehigh Valley R. Co.*, 284 N. Y. 435, 441;
Zwirn v. *Galento*, 288 N. Y. 428, 432.

There is no decided case in New Jersey which passes upon the question whether the New Jersey Workmen's Compensation Act operates to limit or modify in any way the usual common law principles of indemnity. The question has, however, been authoritatively settled in New York by the decision of the New York Court of Appeals in *Westchester Lighting Co.* v. *Westchester Estates Corp.*, 278 N. Y. 175. In that case the New York Court of Appeals specifically held that the New York State Workmen's Compensation Law (the pertinent provisions of which are set forth in full in the attached appendix, *infra*, pp. 24-5) does not bar the maintenance of an action against the employer upon common law principles of indemnity by a third party who has been held liable for the employee's injury. This decision of the New York Court of Appeals has been uniformly followed in the lower Courts of the State of New York.

See:

Clements v. *Rockefeller*, 189 Misc. 885, 70 N. Y. S. 2d 146;
Barbara v. *Stephen Ransom Inc.*, 191 Misc. 957, 79 N. Y. S. 2d 438;
Alloco v. *Gulf Oil Corporation*, 59 N. Y. S. 2d 515;
Gorham v. *Arons*, 76 N. Y. S. 2d 850.

This decision has hitherto been followed and applied by the Court of Appeals for the Second Circuit and by the District Courts for the Eastern and Southern Districts of New York.

See:

Burris v. *American Chicle Co.*, 120 F. 2d 218;
Rich v. *United States*, 177 F. 2d 688;
Rappa v. *Pittston Stevedoring Corporation*, 48 F. Supp. 911;
Severn v. *United States*, 69 F. Supp. 21;
Green v. *War Shipping Administration*, 66 F. Supp. 393;
Corrao v. *Waterman S. S. Corporation*, 75 F. Supp. 482.

It has also been followed by the Eighth Circuit in *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, 954, in a case arising under the Iowa Compensation Act.

The Court of Appeals for the Second Circuit has now, without authority or precedent in the local law, and in conflict with other decisions in the United States Courts of Appeal, introduced a limitation upon an otherwise settled principle of law.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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APPENDIX.

Labor and Workmen's Compensation Laws of the State of New Jersey.

The pertinent portions of the Labor and Workmen's Compensation Laws of the State of New Jersey provide as follows:

34:15-7. Compensation by agreement; defenses; burden of proof.

When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of this article compensation for personal injuries to, or for the death of, such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in sections 34:15-12 and 34:15-13 of this title in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

34:15-8. Election surrender of other remedies.

Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article and an acceptance of all the provisions of this article, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

34:15-9. Presumption as to acceptance of elective compensation provisions.

Every contract of hiring made subsequent to the fourth day of July, one thousand nine hundred and eleven, shall

be presumed to have been made with reference to the provisions of this article, and unless there be as a part of such contract an express statement in writing prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of this article are not intended to apply, then it shall be presumed that the parties have accepted the provisions of this article and have agreed to be bound thereby.

Every contract of hiring made or implied or in operation before the fourth day of July, one thousand nine hundred and eleven, shall be presumed to continue subject to the provisions of this article unless either party shall prior to accident, in writing, notify the other party to such contract that the provisions of this article are not intended to apply.

The Longshoremen's and Harbor Workers' Compensation Act.

The pertinent portions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1937, Ch. 509) 33 U. S. C. §§ 904 and 905 provide as follows:

§ 904. Liability for compensation. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this chapter. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

§ 905. Exclusiveness of liability. The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law

or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Workmen's Compensation Law of the State of New York.

The pertinent portions of the Workmen's Compensation Law of the State of New York provide as follows:

§ 10. Liability for compensation.

Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury, except that there shall be no liability for compensation under this chapter when the injury has been solely occasioned by intoxication of the injured employee while on duty or by wilful intention of the injured employee to bring about the injury or death of himself or another.

§ 11. Alternative remedy.

The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except

that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 618

JOHN SLATTERY,
Plaintiff-Respondent,

against

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

against

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1950

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JOHN SLATTERY,
Plaintiff-Respondent,

against

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

against

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Since the preparation of the petition for writ of certiorari in the above matter the attention of the attorney for petitioner has been called to a decision rendered by the United States Court of Appeals for the Third Circuit on February 21, 1951, in the case of *Salvadore Baccile* v. *Halcyon Lines* and *Haenn Ship Ceiling and Refitting Corporation*, not yet reported, in which the Court held that in an action instituted by an injured employee against a negligent third party under the election provided by Section 33(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., § 933(a), the third party at fault may have contribution from an employer whose negligence

participated in bringing about the injury to the extent of the amount of compensation for which the employer would be liable under the Compensation Act.

Since this decision is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in the instant case and in the case of *American Mutual Liability Insurance Company* v. *Matthews*, 182 F. 2d 322, on which the decision of the Court below in the present case is chiefly rested, it is felt that the decision should be brought to the attention of this Court for its consideration in connection with the petition for a writ of certiorari herein.

MARRA BROS., INC.,
Petitioner,

By EDMUND F. LAMB,
Attorney.

New York, March 15, 1951.

MAR 29 1951

Supreme Court of the United States

OCTOBER TERM, 1950

No. 618

JOHN SLATTERY,

Plaintiff-Respondent,

—against—

MARRA BROS., INC.,

Defendant Third-Party Plaintiff-Petitioner,

—against—

WM. SPENCER & SON CORPORATION,

Third-Party Defendant-Respondent.

BRIEF OF PLAINTIFF-RESPONDENT, JOHN SLATTERY

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Supreme Court of the United States

OCTOBER TERM, 1950

No. 618

JOHN SLATTERY,
Plaintiff-Respondent,

—against—

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

—against—

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

BRIEF OF PLAINTIFF-RESPONDENT, JOHN SLATTERY

Statement

For convenience, John Slattery, the Plaintiff-Respondent will hereinafter be referred to as Slattery. Marra Bros., Inc., the Defendant Third-Party Plaintiff-Petitioner will be referred to as Marra Bros. Wm. Spencer & Son Corporation, Third-Party Defendant-Respondent will be referred to as Spencer.

There are two cases before this Court. One is *Slattery* v. *Marra Bros.*, and the other is *Marra Bros.* v. *Spencer.* The Court of Appeals for the Second Circuit in rendering the opinion of affirmance treated both cases as separate causes of action. The Court of Appeals first decided the case of *Slattery* v. *Marra Bros.*, and thereafter decided the case of *Marra Bros.* v. *Spencer.*

The action of *Slattery* v. *Marra Bros.*, is for damages for personal injuries sustained as a result of the negligence of Marra Bros. The action of *Marra Bros.* v. *Spencer* is for indemnity or contribution from Spencer, the employer of Slattery. The statement of facts in the petition and memorandum of law as submitted by counsel for Marra Bros., is not complete. Other facts will be referred to on the various points in this brief.

At the outset, we do not know why Slattery is before this Court. Counsel for Marra Bros., does not in his petition and memorandum of law claim that error was committed in the trial of the case of *Slattery* v. *Marra Bros.* There is no claim that the verdict in favor of Slattery is an unjust one. There is no demand or request that the facts in that case be reviewed by this Court. The petition and the brief of counsel for Marra Bros., is devoted exclusively to a discussion of the facts and law pertaining to the case of *Marra Bros.* v. *Spencer,* for indemnity or contribution.

POINT I

Marra Bros., in its petition and memorandum of law does not request that the facts in the case of Slattery v. Marra Bros., be reviewed by this Court; Marra Bros., does not claim that error was committed or that the judgment was unjustly rendered.

As we have previously stated, the United States Court of Appeals in affirming both judgments treated the case of *Slattery* v. *Marra Bros.*, and the case of *Marra Bros.* v. *Spencer* separately. The facts and law pertaining to each case were discussed by the Court of Appeals separately.

Counsel for Slattery is unable to understand why Slattery is before this Court. The petition and brief submitted by Marra Bros., does not claim that error was committed in the lower courts in the case of *Slattery* v. *Marra Bros.;* there is no request by Marra Bros. that the facts and law in the case of *Slattery* v. *Marra Bros.*, be reviewed by this Court. Marra Bros. does not contend that the judgment procured against it was unjust. All that Marra Bros. claims in its petition and brief is that error was committed by both the Trial Court and the Court of Appeals in dismissing the claim of Marra Bros., for indemnity against Spencer. Under the circumstances, there is no reason why the facts and law in the claim of *Slattery* v. *Marra Bros.*, should be reviewed by this Court.

POINT II

Marra Bros., in its petition has not requested this Court to review the facts and law in Slattery v. Marra Bros. Rule 38 of this Court prohibits Marra Bros. to insert in a reply brief any matter not contained in its petition.

The petition and brief of Marra Bros. does not request that the facts and law in the case of *Slattery* v. *Marra Bros.* be reviewed by this Court. As we have previously stated, Marra Bros., in its petition and brief makes no claim that error was committed in the lower courts. As a matter of fact, the facts and law in that case are not at all discussed by counsel for Marra Bros., as a basis for review by this Court.

While it is true that the rules of this Court provide that Marra Bros. may submit a reply brief, which must be timely, Marra Bros., may not discuss in its reply brief any matter which has not been stated in the petition. Rule 38 of this Court provides as follows:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

Under the circumstances, the petition being silent as to any errors committed in the lower courts or that the judgment was unjustly procured in the case of *Slattery* v. *Marra Bros.*, Marra Bros. may not now, in a reply brief, raise these questions.

POINT III

Marra Bros., in its brief, submitted to the United States Court of Appeals, admitted that Slattery had a cause of action against it in negligence, but that the degree of negligence against it was not as great as the negligence of Spencer.

Under the circumstances, Marra Bros., having admitted it was a joint tort feasor it may not complain of the judgment rendered against it, as joint tort feasors are severally and jointly liable.

On pages 13 and 14 of the brief submitted to the United States Court of Appeals by Marra Bros., Marra Bros. stated:

> "The only basis upon which it could be argued that Marra may have been guilty of any fault or neglect is that Marra failed in the performance of some duty which it owed to the plaintiff as a person coming upon the pier with its acquiescence and permission to perform a business function thereon. That there is a duty upon the part of the owner or lessee of premises in respect of such persons is recognized, but it is merely a duty to exercise reasonable care to have the premises in a reasonably safe condition or to warn such persons of any hidden danger or defect thereon which might cause injury to such persons."

On page 18 of the brief submitted to the United States

Court of Appeals for the Second Circuit by Marra Bros., Marra Bros. stated:

> "There was no active negligence on the part of Marra in the present case. The most that can be said, if that could constitute fault, was that Marra suffered the employees of Spencer to use door 44 when it was not safely equipped for use without warning them. This, we submit, could not in any event be properly held to constitute negligence on the part of Marra under the facts of the present case, where the lack of the necessary equipment was so open and obvious and the necessary equipment could so easily have been obtained; but even if it could, the negligence would merely be passive, and secondary to the primary active fault of Spencer in putting the door into use under such circumstances."

The trial judge charged the jury that if both Marra Bros. and Spencer were negligent, Slattery could recover against Marra Bros., on the theory of joint tort feasors. Counsel for Marra Bros. was satisfied with the charge of the trial judge as stating the law and no exception was taken to the said charge. At folios 1128 to 1130, on pages 376 and 377 of the Transcript of Record of the trial court, the trial judge in his charge to the jury stated:

> "The law is also well settled that where two or more proximate and sufficient causes combine to produce an injury, a recovery may be had if the defendant is responsible for any one of them. In other words, if the jury feels that both Marra Brothers and Spencer & Son were negligent and that their negligence combined to produce an injury to the plaintiff, the plaintiff may recover

from Marra Brothers. Whenever the separate and independent acts of negligence of several persons, by concurrence, produce a single and indivisable injury which would not have occurred without such concurrence, each is responsible for the entire result and may be sued jointly or severally at the election of the plaintiff. In such a case, the act of negligence of each is a proximate and efficient cause and when several proximate causes contribute to an injury, and each is an efficient cause without the operation of which the injury would not have been caused, it may be attributed to any or all of such causes. Thus, if this jury should conclude that the defendant was negligent and, likewise, that the plaintiff's employer was also negligent, yet if the jury finds the plaintiff free from contributory negligence, the verdict should be for the plaintiff. Under the circumstances in this case, the mere fact that the employer, that is Spencer & Son, was not brought in as a party defendant in this case, does not relieve the defendant, Marra Brothers, from its liability."

To the same effect see:

Restatement of Law of Torts, Section 880;

Murphy v. *Rochester*, 208 A. D. 392, affirmed 240 New York, 629;

Wold v. *Dempster*, 210 A. D. 464.

POINT IV

Should this Court be of the opinion that there is merit in the contention of Marra Bros., for contribution or indemnity from Spencer, then, in that event, the claim of Marra Bros. v. Spencer may be reviewed by this Court without disturbing or reviewing the judgment in favor of Slattery v. Marra Bros.

Slattery is not concerned with the claim of *Marra Bros.* v. *Spencer.* As we have previously stated, there is no claim of error by counsel for Marra Bros., in the case of *Slattery* v. *Marra Bros.*, nor does counsel for Marra Bros. ask this Court to review the facts and law in the case of Slattery.

It has been customary in many instances for a defendant who claims contribution or indemnity from the employer of an injured person to try the issues for indemnity after the judgment in favor of an injured against a defendant has been paid. In the case of *Booth Kelly* v. *Southern Pacific Railroad*, 183 Fed. 2d, page 902, decided June 28th, 1950, the Southern Pacific settled the judgment against it in favor of an injured person. Thereafter the Southern Pacific Railroad brought an action for indemnity against the employer of the injured. In the case of *American Mutual Liability Insurance Company* v. *Matthews*, 182 Fed. 2d, 322, a judgment was procured by the injured against the defendant, a shipowner. After the judgment had been paid the shipowner brought suit against the employer of the injured and the action was tried and disposed of. There are numerous other

instances where the claim of a defendant against the employer of an injured for indemnity or contribution was tried separate and apart from the action of an injured against a defendant.

Marra Bros. asks for indemnity or contribution from Spencer, the employer of Slattery. How is Slattery concerned with this cause of action? Marra Bros. having asserted a third-party claim against Spencer, has the burden of proving it. Counsel for Marra Bros. is in possession of all the facts pertaining to the claim of Marra Bros. against Spencer. He cross-examined the witnesses called by Slattery in Slattery's cause of action against Marra Bros. These witnesses are available to counsel for Marra Bros. at any time it becomes necessary for the claim of *Marra Bros.* v. *Spencer* to be tried after a decision to that effect by this Court.

Why should Slattery's judgment be reversed and he be required to re-try the issues which had been passed upon by the jury, the Trial Court and the United States Court of Appeals. To compel Slattery to re-try his case under the circumstances, would be unjust. If this Court should grant certiorari and subsequently reverse the judgment in favor of Spencer against Marra Bros., there is nothing to prevent Marra Bros., in calling all of the witnesses who testified at the trial of *Slattery* v. *Marra Bros.*, and in submitting such new proof as it desires to sustain its cause of action against Spencer.

POINT V

In view of Marra's admission in its brief to the Court of Appeals that the lifting device on the door which caused the accident was not suitable or appropriate for the purposes intended and in view of the fact that it was the duty of Marra Bros. to supply a shackle which was necessary for the safe operation of the door, the negligence of Marra Bros. was firmly established.

On page 10 of the brief of Marra Bros., to the United States Court of Appeals counsel for Marra Bros., states:

> "Of these facts there was not at the trial and there cannot be the slightest dispute. The equipment present at door 44 on June 13, 1949, consisting of a block, chain and hook were not suitable or appropriate for the raising of the door for the purpose of having persons pass thereunder. In order to elevate the door and hold it in position safely for persons to pass under it, it was absolutely essential that there should have been placed in the eye of the fish-plate on the lower section of the door a shackle in which the hook should have been inserted."

The question which the jury had to determine was who had the duty of furnishing the missing shackle. Under the terms of the lease which Marra Bros. had

with the United States Government, it was Marra's duty to supply the shackle. The lower Court's charge to the jury placed operation and control upon Marra Bros. There was no exception by counsel for Marra Bros. to this charge. At folios 1123 to 1125 at page 375, the trial judge charged the jury as follows:

> "The Court instructs the jury as a matter of law that the defendant, Marra Brothers, had the occupancy of this pier; it had the duty of maintaining in safe condition its hoist operations for the lifting of these doors. It is the duty that grows out of the lease, but most of all out of the occupancy. It is a duty that cannot be delegated. If the jury find that on June 13, 1949, the hoist gear used to hoist the lower half of door No. 44 on Pier 2 in Hoboken had not been maintained in a safe condition and that the defendant, Marra Brothers, should have known of this condition, then the defendant is negligent in that it has failed to use the care and prudence that the law requires one in like circumstances to use. The occupant of the pier owed to Mr. Slattery, a servant of an independent contractor employed to work thereon, the duty of exercising ordinary care to render the premises reasonably safe for the performance of his work. Marra Brothers in this instance was bound to see that the premises were reasonably safe, and if they were not safe, and Marra Brothers could have known of the dangerous condition, and negligently did not know of it, it was liable."

Counsel for Slattery refers this Court to the opinion of the United States Court of Appeals in *Slattery* v. *Marra Bros., Inc.,* a copy of which opinion has been

submitted to this Court by petitioner. The facts and law have been clearly stated. Even if we assume that Marra Bros. and Spencer were joint tort feasors, this would not give the right to Marra Bros. to have judgment against it reviewed by this Court.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari insofar as it pertains to Slattery should be denied for the reasons mentioned in this brief.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1950

No. 618

JOHN SLATTERY,
Plaintiff-Respondent,

—against—

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

—against—

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

BRIEF OF THIRD-PARTY DEFENDANT-RESPONDENT WM. SPENCER & SON CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM—1950

No. 618

JOHN SLATTERY,
Plaintiff-Respondent,

—against—

MARRA BROS., INC.,
Defendant Third-Party Plaintiff-Petitioner,

—against—

WM. SPENCER & SON CORPORATION,
Third-Party Defendant-Respondent.

BRIEF OF THIRD-PARTY DEFENDANT-RESPONDENT, WM. SPENCER & SON CORPORATION

Statement

There are three salient points omitted from Petitioner's Summary Statement:

1. That neither the first third-party complaint nor the amended third-party complaint ever asserted a contract of indemnity between the Petitioner, Marra Bros., Inc., and the Respondent, Wm. Spencer & Son Corporation. On the contrary, in its brief and arguments below, Petitioner con-

ceded that there was no contract of indemnity. In its brief in the District Court, Petitioner wrote as follows:

> "The claim over in the instant case is not based upon an express contract of indemnity * * * " (p. 8).
>
> "We do not claim any express agreement of indemnity" (p. 19).

The Court of Appeals made a Finding to that effect in the following language:

> "However, in the case at bar, not only was the Spencer Company not liable to Slattery, but it had no contract with Marra Bros., Inc., or any other legal relation with it except that of joint tort feasor."

2. Nor did Marra ever assert the existence of an independent duty or obligation owed to it by Respondent, Spencer. The Court of Appeals, likewise, found this to be the fact when it wrote " * * * or any other legal relation with it * * * ". (See above quotation.)

3. Petitioner admitted its negligence in its brief in the Court of Appeals, wherein it stated at page 10:

> "Of these facts there was not at the trial and there cannot be the slightest dispute: The equipment present at door 44 on June 13, 1949, consisting of a block, chain and hook were not suitable or appropriate for the raising of the door for the purpose of having persons pass thereunder. In order to elevate the door and hold it in position safely for persons to pass under it, it was absolutely essential that there should have been placed in the eye of the fish-plate on the top of the lower section of the door a shackle in which the hook should have been inserted."

and at pages 13-14:

> "The only basis upon which it could be argued that Mara may have been guilty of any fault or neglect is that Marra failed in the performance of some duty which it owed to the plaintiff as a person coming upon the pier with its acquiescence and permission to perform a business function thereon. That there is a duty upon the part of the owner or lessee of premises in respect of such persons is recognized, but it is merely a duty to exercise reasonable care to have the premises in a reasonably safe condition or to warn such persons of any hidden danger or defect thereon which might cause injury to such persons."

and again at page 18:

> "The most that can be said, if that could constitute fault, was that Marra suffered the employees of Spencer to use door 44 when it was not safely equipped for use without warning them."

Thus, we find the admission by Petitioner of its own negligence and of its failure to warn Respondent or the injured party of the dangerous condition.

POINT I

The decision below is not in conflict with other decisions in the United States Courts of Appeals.

The conclusions reached by the courts in the cases cited by Petitioner were based upon the existence of facts which substantially differ from those in the case at bar. Moreover, the decisions in the cases cited by Petitioner rested

upon the presence of one or more of the following which are absent from our case:

(a) A contract of indemnity;

(b) An independent duty or obligation owed to the indemnitee by the indemnitor;

(c) The existence of a non-delegable duty or obligation imposed by law;

(d) The absence of any defense that the applicable workmen's compensation act is a complete bar to the suit.

Thus, in *United States* v. *Rothschild International Stevedoring Co.*, 9 Cir., 183 F. 2d, 181, there was no defense that the United States Longshoremen's and Harbor Worker's Compensation Act constituted a bar to the action for indemnity. That issue not being before the Court, naturally could not have played any part of the conclusion. Moreover, in that case, the evidence disclosed "that the slipping had happened twice before and the winch operator reported it to the ship" (p. 182). Despite such warning, the employer permitted its employee to work even though it knew of the defect. At page 182, the Court wrote:

> "It seems equally clear that Rothschild had warning of the defect which was the immediate cause of the accident. With this knowledge Rothschild should not have permitted Dillon to work in this dangerous circumstance as to which it was fully informed."

In the case at bar, Petitioner concedes that " • • • Marra suffered the employees of Spencer to use door 44 when it was not safely equipped for use without warning them". (Petitioner's Brief in Court of Appeals, page 18.)

United States v. *Arrow Stevedoring Co.*, 9 Cir., 175 F. 2d, 329, cited by Petitioner is distinguishable from the case

at bar in that the Court of Appeals found an express contract of indemnity between the parties.

In *Rich* v. *United States*, 177 F. 2d 688, the Court of Appeals for the Second Circuit sustained the right of the Respondent in a suit in admiralty to implead the employer because of the breach by the employer of an independent duty flowing from the indemnitor to the indemnitee. In dismissing the amended third-party complaint in the within action, United States District Judge Conger succinctly distinguished the *Rich* case from the case at bar in the following language:

> "But there was no question of the right of the United States to implead the third-party, aside from the bar of the Act, for the third-party was primarily liable for the injuries in suit, while the United States, which was only constructively negligent, was obligated for the negligence of the third-party solely by reason of a shipowner's non-delegable duty to maintain a seaworthy vessel. As the Supreme Court said in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, in discussing this duty:
>
> > 'It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character (cases cited). It is a form of absolute duty owing to all within the range of its humanitarian policy.' P. 94" (R. 22).

Westchester Lighting Company v. *Westchester County Small Estates Corp.*, 278 N. Y. 175, is similar to the *Rich*

case in that there also the decision turned on the existence of a contractual duty owed by the indemnitor to the indemnitee. At page 179, the Court of Appeals of the State of New York stated:

> "Plaintiff does not sue for damages 'on account of' Haviland's death. Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the defendant."

and on page 180:

> "An independent duty or obligation owed by the employer to the third party is a sufficient basis for the action."

Burris v. *American Chicle Co.*, 2 Cir., 120 F. 2d, 218 involved non-delegable obligation imposed by law. That case extends the common law liability of a land owner, but only by reason of an express statute creating such liability, and in this respect, the *Burris* case is clearly distinguishable from the case at bar. Where as here there is no statutory extension of a land owner's common law liability, the rule in the *Burris* case is not applicable.

In *American District Telegraph Co.* v. *Kittleson*, 8 Cir., 179 F. 2d, 946, the accident to an injured employee happened on the employer's land as distinguished from the case at bar where the accident happened on Petitioner's property. Indemnity was sought from the employer by a contractor who was engaged in work on the employer's land under an agreement between the employer and the contractor. The Court of Appeals permitted recovery over by the contractor against the employer on the theory that there was a violation of an independent duty owed by the employer to the contractor. In its opinion in the case at

bar, the Court of Appeals noted the difference between the *Kittleson* case and the instant case as follows:

> "The decision of the Eighth Circuit in *American District Telegraph Co.* v. *Kittleson*, 179 Fed. (2) 946, can well be rested upon the employer's undertaking to the contractor to furnish the contractor's men with a safe place to work, whose breach was the cause of the injury to one of the employer's workmen."

Booth-Kelly Lumber Co. v. *Southern Pacific Co.*, 9 Cir., 183 F. 2d, 902 was a suit under the Federal Employer's Liability Act, and is distinguishable from the case at bar in that the conclusions of the Court are based on a finding of an express contract between the two joint tort feasors. In that case, there was no defense raised that the applicable workmen's compensation act was a bar to the claim.

We fail to see how the case of *Salvadore Baccile* v. *Halcyon Lines and Haenn Ship Ceiling and Refitting Corporation*, 3 Cir., decided in February, 1951 and not yet reported, in any way enhances Petitioner's argument. The decision in that case is not in conflict with the case at bar. The *Baccile* case was a suit in admiralty where comparative negligence, as the Court of Appeals stated, is said to be "not unknown". In granting contribution to the indemnitee, limited, however, to the extent of the employer's liability under the United States Longshoremen's and Harbor Workers' Compensation Act, the Court used the following language:

> "The Act has intervened in their affairs, and in so responsive a system as the admiralty, we have no difficulty in reaching the equitable solution to a problem not previously contemplated by judicial expressions."

There is no reason or basis to extend, even the limited rule of the *Baccile* case, to the instant case which is a suit at common law where contribution for comparative negligence is unknown.

POINT II

The decision of the Court below is not in conflict with applicable local law.

The accident occurred and the injuries were sustained by plaintiff in the State of New Jersey and the laws of that State apply in this case. The New Jersey Courts have uniformly held that an owner or occupier of lands is not liable to the workmen of an independent contractor, who, under no supervision or direction by the owner or occupier, are injured in the course of their work because of the very condition they are there to correct. The owner is under no greater duty than to exercise ordinary care to render the premises reasonably safe.

Broecker v. *Armstrong Cork Co.*, 128 N. J. L. 3, 24A 2d 194.

It is also the established law of New Jersey that a land owner is not liable to an invitee injured on his property if the injury arose because of a tort of another and the owner himself was not negligent.

Sarno v. *Gulf Refining Co.*, 99 N. J. L. 340, 124A 145;
Broecker v. *Armstrong Cork Co., supra.*

The New Jersey rule is followed by the Courts of the State of New York.

Haefele v. *Woodrich Engineering Co.*, 255 N. Y. 442.

Applying the principles of law enunciated in the cited cases to the case at bar, the third party action was properly dismissed, for it follows that the Petitioner could not have been held liable to the plaintiff if it had exercised that degree of care required of an owner of land and the injury had been caused by the sole neglect of Respondent, Spencer, as was claimed in paragraph Tenth of the amended third-party complaint (R. 18).

Plaintiff's recovery herein against Marra was by reason of Marra's admitted negligence in maintaining a defective door without notice or warning to others. In other words, Marra violated obligations which it owed to business visitors. Under these circumstances, Marra can have no claim over against Spencer. On the other hand, if we assume that the accident was created by the sole negligence of Spencer, then Marra would have been completely absolved and there would not arise any need for a claim over against Spencer. The Trial Court properly instructed the jury on this point (R. 1117, 1128, 1130, 1150, 1153).

CONCLUSION

The decision below is in all respects correct and it is respectfully submitted that the writ of certiorari should be denied.

April 4th 1951.

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